

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

DOMINION ENERGY BRAYTON
POINT, LLC,

Plaintiff,

vs.

MICHAEL O. LEAVITT,
in his capacity as Administrator
of the U.S. Environmental Protection
Agency, et al.,

Defendants.

No. 04-12225 (RCL)

**MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE
REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

Pursuant to Local Rule 7.1(b)(3), Defendants U.S. Environmental Protection Agency, its Administrator Michael O. Leavitt, and its Region I (collectively “EPA”) hereby move the Court for leave to file a Reply Memorandum in Support of EPA’s Motion to Dismiss (“Reply”) as follows:

1. Plaintiff Dominion Energy Brayton Point, LLC (“Dominion Brayton”) filed its Complaint on September 22, 2004, seeking an order instructing one of the Defendants to conduct an evidentiary hearing regarding the terms of a National Pollution Discharge Elimination System (“NPDES”) permit for one of its electric generating facilities known as the Brayton Point Station.

2. EPA responded to the Complaint on December 27, 2004, by filing a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and for failure to state a claim on which relief can be granted.

3. Dominion Brayton submitted a Memorandum in Opposition to EPA's Motion to Dismiss on January 12, 2005 ("Opposition"), which raised several legal issues of national significance with respect to the Clean Water Act, 33 U.S.C. §§ 1251-1387. These issues include: (a) whether Federal District Courts have subject matter jurisdiction over challenges to EPA's denial of procedural requests during NPDES permit proceedings; (b) the proper application of principles of general federal question jurisdiction, court of appeals jurisdiction under Clean Water Act section 509(b), and district court jurisdiction under Clean Water Act section 505(a), to claims that EPA actions taken during the issuance of NPDES permits violate the Clean Water Act; and (c) the significance for purposes of this motion, and the general state, of First Circuit law with respect to Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 (1st Cir. 1978), and its progeny after Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-43 (1984), including Citizen's Awareness Network, Inc. v. United States, 391 F.3d 338 (1st Cir. 2004). EPA also disagrees with Dominion Brayton's characterization of cases addressing several

material issues, including the proper scope of Clean Water Act section 505(a) jurisdiction and challenges to federal rulemakings.

4. The arguments raised in the Plaintiffs' Opposition concern significant issues of federal law, and the various federal courts' authority to hear certain kinds of cases under the Clean Water Act. While the Defendants' arguments in support of dismissal were, in their view, straightforward, the Plaintiff's arguments in opposition distort and mischaracterize the important jurisdictional scheme for federal court judicial review of EPA actions under the Clean Water Act. Accordingly, the Court would benefit from briefing setting forth the Government's position on these newly-raised issues of national importance prior to oral argument.

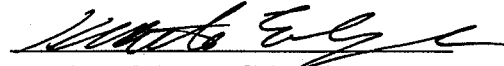
5. Counsel for EPA hereby certifies pursuant to Local Rule 7.1(a)(2) that the Parties conferred on January 13, 14, 21, and 24, 2005, regarding this motion, and Dominion Brayton has decided to oppose the relief sought in this motion.

6. A Proposed Order is attached hereto as Exhibit A.

WHEREFORE, the Court should enter the attached Proposed Order granting Defendants leave to file a Reply Memorandum limited to 15 pages within 10 days after the issuance thereof.

Respectfully submitted,

Dated: January 25 2005



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EPA Administrator MICHAEL O.
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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Motion for Leave to File Reply Memorandum in Support of Motion to Dismiss and Memorandum in Support of Motion for Leave to File Reply Memorandum in Support of Motion to Dismiss, were today served, this 25th day of January 2005, via first class mail, on counsel listed below:

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